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No. 93-1316

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES A. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), which precludes challenges to agency regulations in an enforcement action, deprives the petitioner of due process in contravention of the Fifth Amendment.

2. Whether in order to show a violation of the work practice standards of the Clean Air Act, 42 U.S.C. 7412(e), the government must prove an emission of an air pollutant to the outside air.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A12065-A12075) is reported at 8 F.3d 659. The opinion of the district court (Pet. App. B1-B30) is reported at 783 F. Supp. 546.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993. The petition for a writ of certiorari was filed on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was found liable for two violations of Section 112 of the Clean Air Act (CAA), 42 U.S.C. 7412 (as in effect prior to the CAA's November 15, 1990 amendment[1]), and the National Emission Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Pt. 61, Subt. M (NESHAP) (as in effect prior to the regulation's November 20, 1990 amendment[2]). He was assessed $3,500 in civil penalties. Pet. App. A12067-A12069.

1. Congress enacted the CAA to protect and enhance the quality of the Nation's air resources. 42 U.S.C. 7401(b)(1). Section 112 of the CAA authorizes the Administrator of the Environmental Protection Agency (EPA) to publish a list of hazardous air pollutants that "cause[], or contribute[] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. 7412(a)(1) and (b).

Section 112(b)(1)(B) directs the Administrator to prescribe what are known as National Emission Standards for Hazardous Air Pollutants (NESHAPs), which must be set at a level that provides an ample margin of safety to protect the public health from such hazardous air pollutants. 42 U.S.C. 7412(b)(1)(B). When it is not feasible to prescribe or enforce emission standards, the Administrator may promulgate work practice standards prescribing specific

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[1] See Pub. L. No. 101-549, 104 Stat. 2399.

[2] Our citations to the asbestos NESHAP refer to the version set out at 40 C.F.R. Pts. 61-80 (1989).

procedures for handling hazardous air pollutants. 42 U.S.C. 7412(e).

Section 112(c) of the Clean Air Act prohibits construction of a new source or modification of an existing source, such that the source will emit an air pollutant in violation of an emission standard, and it also prohibits the emission of any air pollutant from any stationary source in violation of an emission standard. 42 U.S.C. 7412(c)(1)(A)-(B). Section 112(e)(5) specifically provides that work practice standards are to be treated as emission standards. 42 U.S.C. 7412(e)(5).

Section 113 of the Act, 42 U.S.C. 7413, authorizes EPA to institute an action for civil penalties and injunctive relief for violation of Section 112(c). Under Section 113, a person is liable for up to $25,000 per day for each violation. The courts have imposed strict civil liability for work practice violations of the Act. See, *e.g.*, *United States* v. *Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *United States* v. *Hugo Key & Son, Inc.*, 731 F. Supp. 1135, 1137 (D.R.I. 1989); *United States* v. *Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1020-1021 (D.N.J. 1988) ("the statute and regulations themselves do not indicate that scienter is required for establishing violations of the Act").

2. In 1971, the Administrator designated asbestos, which has well established harmful effects, as a hazardous air pollutant. 36 Fed. Reg. 5931 (1971). Exposure to asbestos can cause a debilitating lung disease called asbestosis, a rare cancer of the chest and abdominal lining called mesothelioma, and cancers of the lung, esophagus, stomach, colon and other organs. 38 Fed. Reg. 8820 (1973); see *Reserve Mining*

Co. v. *EPA*, 514 F.2d 492, 508 n.26 (8th Cir. 1975) (cataloguing research showing numerous cases of mesothelioma from asbestos exposure of people who merely lived with workers exposed to asbestos).

Significant sources of airborne asbestos include demolition and renovation activities in which insulation containing asbestos is stripped or removed from structures and pipes. The Administrator has issued an asbestos NESHAP that regulates emissions of airborne asbestos by establishing work practice standards for handling asbestos during stripping and removal. 40 C.F.R. 61.146, 61.147, 61.152. The asbestos NESHAP applies to "each owner or operator of a demolition or renovation operation" that strips or removes at least 260 linear feet of asbestos material from pipes or at least 160 square feet of asbestos materials from other facility components. 40 C.F.R. 61.145. An "owner or operator" is defined to include a person who "owns, leases, operates, controls or supervises" a facility that may emit any hazardous air pollutant. 40 C.F.R. 61.02.

The work practice standards at issue in this case require each owner or operator of a renovation or demolition operation in which there is a regulated amount of asbestos to: (1) adequately wet friable asbestos materials when they are being stripped from facility components, unless EPA waives this requirement, 40 C.F.R. 61.147(c); and (2) adequately wet friable asbestos materials that have been removed or stripped and to ensure they remain wet until they are collected for disposal, 40 C.F.R. 61.147(e).

3. Petitioner worked for Savage Enterprises, an asbestos abatement and paint contractor, from March 1985 through July 1988. During that period, petitioner

served at times as both vice-president and president of the 10-15 person company. The company, which was founded in 1984 and dissolved in 1988, performed more than 500 asbestos removal and encapsulation projects during its existence. Pet. App. B35-B36 (Admitted Facts).

On August 22, 1989, the United States filed a complaint seeking both civil penalties and injunctive relief from Savage Enterprises, James Savage, the company owner, and petitioner for violations of the asbestos NESHAP. The complaint alleged that seven different asbestos removal projects performed by Savage had violated the asbestos NESHAP. A consent decree settling the case with James Savage and Savage Enterprises was entered on September 13, 1991. No settlement could be reached with petitioner. Pet. App. A12068.

In November 1991, a five-day bench trial was held in which the United States presented evidence of asbestos NESHAP violations at four asbestos removal jobs that petitioner supervised.[3] At two of those sites, the district court found insufficient evidence of petitioner's involvement to support liability. At two other job sites, Sea-Tac Airport and the Crab Pot Restaurant, the district court found petitioner liable for violations of the asbestos NESHAP. Pet. App. B9-B19.

Specifically, after the testimony of several witnesses, the district court found petitioner liable for conducting a dry removal of asbestos at Sea-Tac

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[3] Although seven asbestos removal projects were originally at issue, the district court dismissed the United States' claims as to one site and, at the request of the district court, the United States limited its proof at trial to four sites.

without following the procedures prescribed for obtaining a waiver of the wetting requirement, 40 C.F.R. 61.147(c), and the court found petitioner liable for failing to ensure that friable asbestos material at that site remained wet until collected for disposal, 40 C.F.R. 61.147(e). Pet. App. B9-B13. At the Crab Pot restaurant site, petitioner similarly failed to ensure that friable asbestos at the site remained wet until collected for disposal. *Id.* at B15-B18.

Petitioner asserted throughout the trial that the United States could not demonstrate a violation of the CAA by merely showing a violation of a work practice rule. Rather, petitioner contended that the United States must show that a pollutant was emitted to the outside air. The district court rejected that contention. The court observed that work practice standards are imposed in those cases where it is not feasible to prescribe or enforce an emission standard for control of a particular hazardous pollutant. The court therefore held that a violation of a work practice standard constitutes a violation of the Act. Pet. App. B20, B24-B26. In the alternative, the district court held that the United States had shown by a preponderance of the evidence that petitioner caused asbestos materials to be emitted to the outside air during removal or after removal in violation of 42 U.S.C. Section 7412. *Id.* at B20.

The district court assessed $3,500 in civil penalties against petitioner and enjoined him from performing further asbestos-removal projects for a two-year period without first notifying EPA. Pet. App. B28-B29, B31-B33 (Injunction).

4. Petitioner raised numerous challenges on appeal, including the argument that there can be no

violation of the CAA without proof of an emission of an air pollutant to the atmosphere. Appellant's C.A. Br. 23-28. The United States responded to that argument on the merits. Gov't C.A. Br. 14-22. The United States also noted that petitioner was effectively challenging the validity of the asbestos NESHAP and that Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), expressly prohibits such challenges in an enforcement proceeding. Gov't C.A. Br. 15-17.[4]

Petitioner replied that he was not challenging the validity of the regulations and that even if he was, the court should permit his challenge because he was not in the asbestos abatement business at the time the regulations were issued and therefore lacked standing to challenge the regulations at that time. Appellant's C.A. Reply Br. 2-3. Petitioner suggested in his reply brief that "serious *constitutional due process* concerns arise if Section [307(b)(2)] in fact operates to bar [petitioner] from raising the legal issues that he now asks this Court to review." Appellant's C.A. Reply Br. 4. Petitioner, however, did not raise the constitutionality of Section 307(b)(2) as one of the 12 issues he presented for review, Appellant's C.A. Br. 1-4, nor did he brief that issue, Appellant's C.A. Reply Br. 4.

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[4] Section 307(b)(2) states:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) [42 U.S.C. 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

The court of appeals affirmed the district court's judgment and rejected petitioner's various arguments. Pet. App. A12065-A12075. Among its conclusions, the court held that petitioner's challenge to the Asbestos NESHAPS regulations was prohibited by Section 307(b)(2) of the CAA. The court's opinion contains no discussion of whether Section 307(b)(2) violates the Due Process Clause.

ARGUMENT

Petitioner asserts (Pet. 28-45) that Section 307(b)(2) of the CAA, which prohibits challenges to CAA regulations in an enforcement proceeding, violates the Due Process Clause. Petitioner further contends (Pet. 45-50) that EPA's interpretation of the CAA and the Asbestos NESHAPs regulations is erroneous. Petitioner's contentions are not supported by a single court decision and do not warrant review by this Court.

1. Petitioner devotes most of his argument (Pet. 27-45) to an issue that he did not raise in the court of appeals and that the court of appeals did not decide: whether Section 307(b)(2) of the CAA violates the Due Process Clause.[5]

Section 307(b)(2) provides that judicial review of the standards set by EPA must be sought only in the United States Court of Appeals for the District of Columbia within 60 days of the notice of promulgation of the standards. 42 U.S.C. 7607(b)(2). Congress

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[5] Petitioner implicitly concedes that he failed to raise the issue in the court of appeals: He relies on his answer to the United States' complaint for the proposition that the due process issue has been preserved for this Court's review. See Pet. 15-16.

enacted Section 307(b) to foster finality by providing a single forum for determining whether rules are properly promulgated. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284-285 (1978). As petitioner notes (Pet. 30 n.28), similar provisions are found in several environmental statutes.[6]

Petitioner contends that those provisions are all unconstitutional because they do not comport with the requirements of due process. Petitioner can point to no judicial decision supporting that argument. To the contrary, this Court held in *Yakus* v. *United States*, 321 U.S. 414, 433-437 (1944), that Congress could require that the validity of a regulatory action be challenged in a particular court at a particular time or not at all. Similarly in *Adamo Wrecking*, this Court held that while a district court may determine whether the regulation that the defendant is alleged to have violated is an emission standard, the court may not "engage in judicial review in a manner that is precluded by § 307(b)(2) of the Act." 434 U.S. at 285. Both of those cases involved criminal prosecutions.[7]

This Court has recognized that Congress possesses great latitude in determining the jurisdiction of the courts and deciding where and when issues

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[6] See 33 U.S.C. 1369(b)(2) (Federal Water Pollution Control Act); 42 U.S.C. 4915(a) (Noise Control Act); 42 U.S.C. 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. 6976 (Solid Waste Disposal Act).

[7] One Member of the Court in *Adamo Wrecking* stated that if the constitutionality of Section 307(b) of the CAA had been raised "it would have merited serious consideration," 434 U.S. at 289 (Powell, J. concurring). But in this case, as in *Adamo Wrecking*, the issue was not raised below.

shall be adjudicated. See, *e.g.*, *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748 (1974); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332 (1966). The lower courts have respected that principle and have routinely held that Section 307(b)(2) and similar provisions foreclose parties from challenging the validity of regulations except through the mechanisms that Congress has provided. See, *e.g.*, *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155 (5th Cir. 1985) (Section 307(b) deprived district court of subject matter jurisdiction to a challenge of regulations), cert. denied, 474 U.S. 1070 (1986); *Luckie* v. *EPA*, 752 F.2d 454, 456-457 (9th Cir. 1985) (Section 307(b) bars review of challenge to an emission standard); *United States* v. *B.F. Goodrich Co.*, 609 F. Supp. 1, 5 (W.D. Ky. 1984) (Section 307(b)(2) precludes review of vagueness challenge to regulation); *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 914 (D.C. Cir. 1979) (Section 16(a) of the Noise Pollution Control Act deprived court of jurisdiction over challenge to regulations); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892 (8th Cir. 1977) (describing a challenge to Section 307(b)(2) as "without merit").

No court has sustained a due process objection to Section 307(b)(2), and the extra-judicial sources that petitioner cites (Pet. 41-50) fall far short of demonstrating a constitutional issue warranting this Court's review.[8] Even if the issue had generated a

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[8] Petitioner relies on the Administrative Conference's 1982 recommendations and on a law review article by Professor Currie. Pet. 41-50. Neither of those authorities, however, asserts that review preclusion provisions like Section 307(b) are necessarily unconstitutional. See 47 Fed. Reg. 58,208, 58,210

conflict among the courts of appeals, this case would be an inappropriate vehicle in which to resolve the matter. As we have noted, the issue was not adequately raised nor decided in the court of appeals. Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246, 269 n.19 (1976) (noting that this Court declined to review a due process challenge to Section 307(b) where that challenge was neither presented to nor considered by the court of appeals).

2. Petitioner contends that EPA's interpretation of its regulations and the CAA is in error. Specifically, petitioner asserts that a violation of the CAA cannot be found unless there is an emission of an air pollutant to the outside air. No court has ever accepted that argument, and the assertion is without merit.[9]

Section 112(e)(1) of the CAA grants EPA power to develop work standards for air pollutants. 42 U.S.C. 7412(e)(1). Work standards are appropriate when "it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants." 42 U.S.C. 7412(e)(1). Section 112(e)(5) expressly provides that a work practice standard is to be "treated as an emission standard" for purposes of the Act. 42 U.S.C. 7412(e)(5). Congress enacted Section 112(e)(5) following this Court's decision in

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(1982); Currie, *Judicial Review Under Federal Pollution Control Laws*, 62 Iowa L. Rev. 1221, 1259 (1977).

[9] Petitioner relies (Pet. 22, 48-49) on the initial decision in *United States* v. *MPM Contractors, Inc.*, 31 Env't Rep. Cas. (BNA) 1550 (D. Kan. 1990), to support his interpretation of the CAA. That decision, however, was vacated on the government's motion for reconsideration. 767 F. Supp. 231 (D. Kan. 1990).

Adamo Wrecking to remove any ambiguity concerning enforceability of work practice standards. See Pub. L. No. 95-623, § 13, 92 Stat. 3457.[10]

The courts have uniformly held that a violation of a work practice standard constitutes a violation of the Act. The Sixth Circuit has stated, in the context of a criminal Clean Air Act violation, that the government needs "to prove either that defendants emitted asbestos into the atmosphere *or* that they violated the work practice standards." *United States* v. *Louisville Edible Oil Products, Inc.*, 926 F.2d 584, 588 (6th Cir.) (emphasis added), cert. denied, 112 U.S. 177 (1991); see also *Sealtite Corp.*, 739 F. Supp. at 468 (failure to follow asbestos NESHAP automatically results in liability).[11]

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[10] Congress's motivation is summarized by the statement of Rep. Rogers:

> [T]he proposed legislation includes technical amendments intended to remove ambiguity about the status and enforceability of nonnumerical emission control requirements under title I of the Clean Air Act. These ambiguities were called to the Congress [*sic*] attention by the * * * decision in *Adamo Wrecking Company* * * *.
>
> These technical amendments make clear that both numerical and non-numerical emission control requirements promulgated under Section 111 or 112 of the act are enforceable by [EPA]. * * * Thus, civil or criminal enforcement action under section 113 would be authorized for violations of non-numerical emission control requirements under section * * * 112 of the act[.]

124 Cong. Rec. 31,228 (1978). For a discussion of the history of Section 112(e), see D. Currie, *Air Pollution: Federal Law and Analysis* § 3.27 (1983).

[11] The courts have also rejected arguments that the government must show visible emissions of asbestos in order to

Furthermore, petitioner's arguments ignore the purpose of the work practice standards. The work practice standards are necessary in part because measurement of asbestos emissions is technologically and economically impractical. 43 Fed. Reg. 26,372 (1978). Petitioner's argument that EPA must prove emissions into the ambient air in every enforcement action is contradicted by EPA's express finding of the impracticality of such measurements. Indeed, an express purpose of the CAA is "to assure that regulatory action can effectively prevent harm before it occurs." *Sierra Club* v. *Gorsuch*, 551 F. Supp. 785, 787 (N.D. Cal. 1982). That goal would be thwarted if the United States may enforce a prophylactic work practice requirement only in those cases in which the government can prove an actual emission. See *Tzavah Urban Renewal Corp.*, 696 F. Supp. at 1021-1022, quoting *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987).[12]

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prove a violation of the work practice standards. *United States* v. *Ben's Truck & Equipment, Inc.*, 25 Env't Rep. Cas. (BNA) 1295, 1299 (E.D. Cal. 1986) (rejecting contention that the government must prove visible emissions of asbestos occurred in order to prove a violation of 40 C.F.R. 61.147(d)); *United States* v. *MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990) (expressly rejecting assertion that dust emissions are a prerequisite to a finding that friable asbestos materials were inadequately wetted).

[12] Moreover, the district court in this case expressly found that the United States had shown by a preponderance of the evidence that petitioner had caused asbestos materials to be emitted to the outside air. Pet. App. B20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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